

**No. 20,283**  
**United States Court of Appeals**  
**For the Ninth Circuit**

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DALE MATHIS,

*Appellant,*

VS.

UNITED STATES OF AMERICA,

*Appellee.*

**APPELLEE'S ANSWERING BRIEF**

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### APPELLEE'S ANSWERING BRIEF

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#### STATEMENT OF JURISDICTIONAL FACTS

The indictment herein charged a violation of Title 21, United States Code, Section 176(a), in each of two counts, offenses against the United States. Under Title 18, United States Code, Section 3231, the United States District Court had original jurisdiction. Upon the jury's verdict of guilty as to each of the two counts, the Appellant was sentenced. It is conceded that this Court has jurisdiction over appeals from such final decisions of a District Court under the provisions of Title 28, United States Code, Section 1921, and by virtue of Rule 27(a), Federal Rules of Criminal Procedure.

**STATEMENT OF THE CASE**

This is an appeal from the conviction of the Appellant, Dale Mathis, in the United States District Court for the District of Nevada.

Count I of the Indictment upon which the conviction was based charged Appellant with receiving, concealing, and facilitating the transportation and concealment of marihuana on or about July 10, 1964. Count II dealt with Appellant's possession of a portion of a marihuana cigarette on or about September 17, 1964 (R. 7, 8)<sup>1</sup>.

Appellant has specified as error the Court's permitting the witness Shearer to be questioned in the presence of the jury concerning Exhibits 10 and 11 for identification, the giving of Court's Instruction A relative to Exhibits 10 and 11 for identification, and the trial court's failure to grant Appellant's Motion For Judgment of Acquittal or Appellant's Alternative Motion For a New Trial (Opening Brief, pp. 6, 7, 8).

Factually, a Federal Narcotic Agent, Richard Salmi, was introduced to an informant produced by the Sheriff's Department of Clark County, Nevada on July 9, 1964 (T.75).<sup>2</sup> The informant's name was Harrison Allan Shearer. The purpose of his introduction to Agent Salmi was to introduce to Salmi dope traffickers in North Las Vegas, Nevada (T.100).

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<sup>1</sup>"R." as used herein refers to the Record on Appeal.

<sup>2</sup>"T." as used herein refers to the Transcript of Testimony.

Approximately an hour after their initial meeting, Shearer took Agent Salmi to the residence of Appellant's parents in North Las Vegas and there introduced the agent to the Appellant (T. 75, 76). There followed discussion of marihuana purchases (T. 76, 77) and then the agent, informant, and Appellant drove in the agent's vehicle to a park in North Las Vegas, this being on July 10, 1964 at approximately 1:00 o'clock a.m. (T. 75). After a chance meeting with some acquaintances of the Appellant and informant, and a brief encounter with the police (T. 27, 80), the agent followed the Appellant and the informant into a playground area containing a shed-type playhouse open at both ends (T. 81). Appellant walked into the shed, followed immediately by the agent, and the agent observed the Appellant reach up and obtain a vial from the roof of the playhouse, leave the playhouse, and hand the vial to the informant (T. 81, 82).

At this point, Appellant Dale Mathis said:

"Let's light up."

At the same time, he produced some cigarette papers, but the agent was successful in discouraging any further activity of this nature (T. 82). The three men then left the park area, entered the agent's car and drove to the Bonanza Club in North Las Vegas. There, at approximately 2:00 o'clock, a.m., on July 10, 1964, they had refreshments and further discussed the purchase of kilogram quantities of marihuana (T. 82, 83).

The agent next drove Appellant back to his house, arriving somewhere around 3:00 o'clock, a.m., on July

10, 1964, and engaged in additional conversation concerning marihuana purchases, at which point Appellant left the car (T. 84, 85). After Appellant left the car, the informant handed to the agent the vial Appellant had given him. Shortly thereafter, the agent let the informant out of the car and returned to his hotel (T. 86, 87).

The contents of the plastic vial and the plastic vial, itself, were admitted into evidence as plaintiff's Exhibit No. 4 and Exhibit No. 5, respectively (T. 126).

On July 12, 1964, the informant executed a statement (plaintiff's Exhibit 10 for identification) in the presence of Agent Salmi, another Narcotic Agent, and a Clark County Deputy Sheriff (T. 95, 96).

The Appellant was arrested in the early morning hours of September 17, 1964, and during the subsequent booking at the Clark County, Nevada jail a partially smoked marihuana cigarette was discovered in the pocket of his trousers (T. 146). It is this cigarette (Exhibit 9) with which Count II of the Indictment is involved.

On March 9, 1965, Appellant's Motion To Suppress Evidence was filed (R. 9), Appellant alleging illegal seizure and an insufficient Commissioner's Complaint. In support of his motion, Appellant, on April 2, 1965, filed the affidavit of the informant, Harrison Allan Shearer. In the affidavit, the informant stated, in substance, that he and the Appellant had purchased catnip, a vial of which they had placed in Fantasy Park

previous to going there with Agent Salmi (R. 11, 12). Appellant's motion to suppress was denied during the course of the trial (T. 124).

Informant Shearer was called as a witness for Appellee, and following some preliminary testimony testified as follows (T. 34) :

“Q What happened at Fantasy Park?

A Nothing that I know of.”

At this point in the trial, the previous statement of the informant (Exhibit 10 for identification) was handed to him. He indicated that he had executed it after reading it, but that he didn't really voluntarily sign it (T. 34, 35). Thereupon, Government counsel requested the witness be declared hostile and that permission be granted to ask leading questions (T. 36). This request was granted by the trial court, and the prior testimony of the witness to the effect that nothing he knew of happened at Fantasy Park was substantially impeached (T. 37-40).

In addition, a letter acknowledged by the witness to have been written by him to Appellant (marked for identification as Exhibit 11) was shown to the witness. He was asked leading questions further impeaching his credibility (T. 40-43), and the Court (T. 44) without being requested permitted counsel for Appellee to quote from both Exhibits 10 and 11 for identification. Portions of the letter were quoted and the witness was questioned concerning same (T. 44-47).

The witness was cross-examined concerning both Exhibits 10 and 11 for identification (T. 62-64) and

the Court further examined the witness concerning Exhibit 10 for identification (T. 68-71).

The defendant made objection to the aforementioned questioning by the Court, as well as that by Appellee's counsel. Neither exhibit was offered into evidence.

Appellant made timely motions for judgment of acquittal at the close of the Government's case (T. 156), at the close of all the evidence (T. 222), and following the defendant's conviction (R. 18). In each case the motion was denied.

On May 24, 1965, Appellant was sentenced to the custody of the Attorney General for a period of seven years on each count of the indictment, the same to run concurrently (R. 22).

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### **SUMMARY OF ARGUMENT**

1. The District Court committed no error in permitting the witness Shearer to be questioned in the presence of the jury concerning Exhibits 10 and 11 for identification.

2. The District Court committed no error in giving Court's Instruction A.

3. The District Court did not err in denying Appellant's Motion for Judgment of Acquittal or in the Alternative for a New Trial.

**ARGUMENT**

1. THE DISTRICT COURT COMMITTED NO ERROR IN PERMITTING THE WITNESS SHEARER TO BE QUESTIONED IN THE PRESENCE OF THE JURY CONCERNING EXHIBITS 10 AND 11 FOR IDENTIFICATION.

The second witness called to testify before the jury was Harrison Allan Shearer, who testified on direct examination that he met Agent Salmi in July of 1964 (T. 32); that in the early morning of July 10, 1964 he took the agent to Appellant's residence (although he also indicated elsewhere in his testimony that this occurred at 10:00 o'clock at night), and introduced the agent to the Appellant (T. 33). Shearer testified (T. 34) that he made known to the Appellant that Salmi was an agent and that after a discussion they all went to Fantasy Park.

At this point, the following testimony occurred (T. 34):

“Q. What happened at Fantasy Park?

A. Nothing that I know of.”

Shearer testified (T. 68) that he had executed a statement for the agent three or four evenings after the events of July 10, 1964. Additional testimony (T. 119) showed that this statement was given on July 12, 1964. The statement was marked for identification as plaintiff's Exhibit 10 (T. 34) and was not offered or admitted into evidence.

As stated by Appellant (Opening Brief, p. 9), on April 2, 1965, a week prior to trial, Appellant's counsel filed an affidavit of Harrison Allan Shearer in support of a previously filed motion to suppress evi-

dence (R. 11). This affidavit was to the effect that he, the informant, Shearer, and Appellant had planted catnip in a vial to trick Agent Salmi. Appellant, however, testifying in his own behalf (T. 202, 203), stated that he did not observe the purchase of any catnip, as indicated by Shearer, and that he had not in fact removed any vial from the playhouse at Fantasy Park.

Upon Exhibit 10 for identification being shown to the witness Shearer and he having acknowledged reading the same and its execution (T. 35), counsel for Appellee requested that the witness be declared hostile and to be permitted to ask leading questions, which request the trial court granted (T. 36).

Counsel for Appellee thereupon proceeded to ask Shearer leading questions, referring him on occasion to plaintiff's Exhibit 10 for identification. The informant readily testified to events occurring at Fantasy Park (of which he had previously denied knowledge) (T. 37-39).

Appellant first states (Opening Brief, p. 10) that the case does not come within the exceptions to the rule that a party may not impeach his own witness, as those exceptions are set out in *Meeks v. United States*, 9th Cir. 1950, 179 F.2d 319, but counsel does not include in his brief all of the exceptions. It is stated in *Meeks*, supra, at page 321:

“ ‘The prosecution in a criminal case may impeach a witness whom it is under a legal duty or obligation to call, *such as an available witness to the crime*, a witness who has testified before the grand jury, or a witness whom the court compels the prosecution to call.’ ” (Emphasis added.)

Next, Appellant urges (Opening Brief, p. 11) that the use of Exhibit 10 for identification was proper, provided the Government was surprised by Shearer's testimony, and in support Appellant cites *Fong Lum Kwai v. United States*, 9th Cir. 1939, 49 F.2d 19.

Appellee will readily concede that it never *vocally* asserted surprise at Shearer's testimony, and, further, that it was aware of Shearer's previously filed affidavit. Nevertheless, Appellee urges that the rule is otherwise than as asserted by the Appellant.

The trial court may in its discretion, if satisfied that surprise exists, permit leading questions and examination of a witness with respect to prior conflicting statements (and it was obvious to the trial court, the informant's affidavit (R. 11), referring to events which occurred at Fantasy Park, having been submitted prior to trial, and the informant having acknowledged his signature on plaintiff's Exhibit 10 for identification, that surprise existed at the point of Shearer's testifying that nothing he could remember occurred at Fantasy Park). Certainly, the granting of the request to lead the witness would not, under such circumstances, constitute an abuse of the Court's discretion.

In *Weaver v. United States*, 9th Cir. 1954, 216 F.2d 23, the witness had given a statement to the Federal Bureau of Investigation and thereafter had refused to testify in accordance with that statement before a grand jury. When, at the trial, the Government sought to impeach the witness, the defense argued there could be no surprise. This Court stated, at page 25:

“The Government, however, had a right to anticipate that, under oath and in court, she would testify in accordance with her story to the Federal Bureau of Investigation.”

Appellant further relies upon this Court’s decision in *Sullivan v. United States*, 9th Cir. 1928, 28 F.2d 147 (Opening Brief, p. 13).

That case is not, it is respectfully submitted, analogous to the case at bar. There three witnesses had, while in prison, joined in a statement. When the first of the three witnesses failed to testify as anticipated, the Court held that the testimony of the other two witnesses was incompetent.

The Court’s attention is respectfully directed, in connection with Appellant’s position that the Government was required to vocally express surprise, to its decision in *Bieber v. United States*, 9th Cir. 1960, 276 F.2d 709, where it was stated at page 713:

“If the Court is satisfied that the ‘surprise’ exists, either from the statement of counsel *or otherwise*, that is all that is required to permit the examination of the witness as to his prior contradictory statement.” (Emphasis added.)

The question of impeaching one’s witness by use of a prior contradictory statement was the subject of a scholarly discussion by Judge Hand in *United States v. Allied Stevedoring Corp.*, 241 F.2d 925, at page 932.<sup>3</sup>

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<sup>3</sup>In view of the length of the discussion referred to, it is set forth in an appendix hereto at page i, *infra*.

Appellant argues (Opening Brief, p. 13) that the Government's purpose in using Exhibit 10 for identification, in addition to neutralizing the testimony of Shearer, was to place otherwise inadmissible evidence before the jury. In response, Appellee asserts that the sole objective was to place the witness in a position so as to result in the jury's knowing as much as possible about his credibility, thus permitting the jury to make an accurate appraisal of his testimony. The Appellant should not be heard to complain of Shearer's impeachment by the prosecution since he also had an interest in destroying Shearer's credibility. Shearer had given an affidavit (R. 11) and testified before the jury (T. 512) on cross-examination that he had placed a vial of catnip in the playhouse, that Appellant was aware of this, and that Appellant had removed it from the playhouse in the agent's presence.

Appellant, himself, then testified (T. 202, 203) that he had not seen Shearer purchase any catnip, nor had he in fact obtained any vial from the playhouse. Thus, it is argued, Appellant was not prejudiced by Shearer's impeachment.

Appellant further argues (Opening Brief, p. 14) that the questioning of Shearer both by the Government and by the Court from Exhibit 10 for identification was error and states (Opening Brief, p. 15) that the jury saw the exhibit. It is Appellee's position that the above arguments apply as well to the action of the Court. Further, the record is clear that the jury did not see either Exhibit 10 or 11 for identification in the sense that they were allowed to read or examine the exhibits.

Moving on to plaintiff's Exhibit 11 for identification, Appellee asserts that its use had no effect other than to further impeach Shearer's credibility. It was clearly established by examination (T. 45-47) of Shearer from the letter marked for identification as plaintiff's Exhibit 11 he had expressed an intent to testify either for the Government or for the Appellant, depending upon how the Appellant treated him.

With respect to both Exhibits 10 and 11 for identification, any prejudicial effect against the Appellant was rectified by the Court's Instructions (T. 263-265):

"Now, I should comment, I think, on this instruction. We talked about a Government agent, an informer, decoy of some sort. For the purpose of this case, Mr. Shearer, Allen Shearer, should be deemed a Government agent, so when you consider the question of lawful or unlawful entrapment, this instruction that I have just read to you, treat not only Agent Salmi but treat Mr. Shearer as a Government agent.

"Now, the witness, Harrison Shearer, or Allen Shearer, whatever his full name was, was examined by counsel and by the Court as to certain portions of or quotations from two prior written statements made by him. One statement marked Exhibit 10 for Identification, but *not received in evidence*, was a statement in the handwriting of Agent Salmi signed by the witness Shearer. The other statement, marked Exhibit 11 for Identification, *also not received in evidence*, was a letter written by the witness Shearer to the defendant.

"Now, it appeared to the Court that some of the quoted portions of these two prior written state-

ments were inconsistent with the testimony of the witness Shearer given before you.

“The only purpose of so questioning witness Shearer and confronting him with portions of or quotations from his prior written statements while he was on the stand was to permit you to weigh those portions and quotations of the prior statements and his answers when questioned about the same, together with his other testimony given before you, all for the purpose of assisting you in determining what credibility and weight you may wish to give to the testimony of the witness Shearer.

“It is the exclusive province of the jury to disregard the Court’s comment that there are inconsistencies between portions of the prior written statements and the defendant’s testimony before you. The jury alone are the sole judges of the facts, not the Court.

*“Now, and this is most important, no part of these prior statements or of Shearer’s answers when questioned about the same in any way bind the defendant. They do not constitute any evidence against him. The said evidence was received only for the limited purpose that I have just described and such evidence is not to be considered in determining the guilt or innocence of the defendant. I make particular reference in this regard to the letter to the defendant, Exhibit 11 for Identification. The portions of and quotations from that letter that you have heard are not evidence against this defendant. In order for you to find the defendant guilty, you must be convinced of his guilt beyond a reasonable doubt*

from all of the other evidence in the case, *exclusive of any of the portions or quotations from the two prior written statements of the witness Shearer's answers when questioned about the same.*

“... You are to consider only the evidence in this case, but in your consideration of the evidence, you are not limited to the bald statements of the witnesses. On the contrary you are permitted to draw from facts which you find have been proved such reasonable inferences as seem justified in the light of your own experience.” (Emphasis added.)

The jury was further instructed (T. 268, 269) :

“The testimony of an informer, or any witness whose self-interest or attitude is shown to be such as might tend to prompt testimony unfavorable to the accused, should always be considered with caution and weighed with great care.

“A witness may be discredited or impeached by contradictory evidence or by evidence that at other times the witness has made statements which are inconsistent with the witness' present testimony, or by evidence that the general reputation of the witness for truth, honesty or integrity is bad.

“If you believe any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves.

“If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness' testimony

in other particulars and you may reject all the testimony of that witness, or give it such credibility as you may think it deserves.”

The trial court’s position on the question of the prior contradictory statements was clearly expressed out of the jury’s hearing (T. 72, 73):

“The Court: I think we have gone far enough on 11. I have no doubt but that the statement may be used in the manner that I used it. Our objective here is to bring out the truth and this witness is obviously reluctant and I allowed excerpts of Exhibit 11 to be read to the jury so the jury may, in determining his credibility as well as the credibility of other witnesses in this case, have in mind the fact, at least, in the letter stated that he would testify to the benefit of the defendant. . . .”

Appellant appears to take the position (Opening Brief, pp. 16, 17) that the Court’s Instruction A (T. 263-265) was insufficient to remove from the minds of the jurors things of a nature prejudicial to Appellant contained in Exhibits 10 and 11 for identification. In support of that position, Appellant cites (Opening Brief, p. 17) Judge Hand’s opinion in *United States v. Block*, 2nd Cir. 1937, 88 F.2d 618, 620.

Some 20 years after *United States v. Block*, supra, Judge Hand had occasion to again discuss the effect of a jury instruction, and prior contradictory statements were involved. In *United States v. Allied Stevedoring Corp.*, supra (241 F.2d at 933), it was stated:

“... It is not, however, necessary in the case at bar to hold that the earlier statements might have been so used, because in the ‘supplementary’

charge the judge made it abundantly clear that, except in the case of the defendants themselves, only the witnesses' testimony on the stand was to be taken as evidentiary. However unlikely it may be that this is a feat possible for most minds, when the contradictions have once come before them, it is not as difficult as that required by the more intricate bit of mental gymnastic involved in confining the use of a defendant's admissions when they concern other defendants as well as him. *Delli Paoli v. United States*, 77 S.Ct. 294. We should indeed welcome any efforts that help disentangle us from the archaisms that still impede our pursuit of truth."

In *Wheeler v. United States*, D.C. Cir. 1953, 211 F. 2d 19, cert. den. 347 U.S. 1019, 98 L.Ed. 1140, 74 S.Ct. 876, Judge Bazelon stated by way of a note in response to Appellant's contention that although a prior statement of a witness might have been admissible for impeachment purposes, the trial court erred in permitting the statement to be read in its entirety:

"This, it is said, is particularly true since the statement, highly harmful to appellant, was prepared by a policewoman and signed by the child without reading it at a time when she was too distraught to know what she was doing. Neither the circumstances of the signing nor the inflammatory nature of its contents provides a bar to admission for impeachment purposes only. Such matters are merely a part of the complex of circumstances which the jury may consider in determining the impeaching effect, if any, of the earlier statement upon the credibility of the testimony uttered from the stand."

Finally, it is submitted, there was substantial evidence in the form of Agent Salmi's testimony from which the jury could find beyond reasonable doubt that Appellant, Dale Mathis, was guilty of the offenses charged in the indictment.

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**2. THE DISTRICT COURT COMMITTED NO ERROR IN GIVING COURT'S INSTRUCTION A.**

Appellant has specified as error the Court's giving of its Instruction A. The Court did, over Appellant's objection, instruct the jury (T. 263-265) as indicated beginning with the fourth full paragraph on page 12, supra, and continuing through the fifth line on page 14, supra. The emphasis was placed on the fact Appellant was not to be bound by the answers of Shearer and that nothing mentioned in either of the exhibits for identification constituted evidence against the Appellant.

The instruction was, it was respectfully urged, clear in its terms and completely fair to the Appellant.

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**3. THE DISTRICT COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL OR IN THE ALTERNATIVE FOR A NEW TRIAL.**

In determining defendant's motions under Rule 29, Federal Rules of Criminal Procedure, the Court was entitled to examine the evidence in the light most favorable to the Government. *Glasser v. United States*, 315 U.S. 60, 86 L.Ed. 680, 62 S.Ct. 457 (1941).

It is respectfully urged that there was sufficient evidence before the jury in the form of the testimony of Agent Salmi and the other officers, together with the expert testimony identifying the contents of the vial and cigarette as marihuana, to enable the jury to find beyond a reasonable doubt that the defendant was guilty as charged.

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### CONCLUSION

Appellee, United States of America, submits that in conclusion, in view of the foregoing arguments and considering the entire record herein, there was no error committed by the trial court in a degree sufficient to result in reversal of the judgment herein or to result in the granting of a new trial for the Appellant.

Dated, Las Vegas, Nevada,  
October 7, 1965.

Respectfully submitted,

JOHN W. BONNER,

United States Attorney,

ROBERT S. LINNELL,

Assistant United States Attorney,

*Attorneys for Appellee.*

## CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ROBERT S. LINNELL,  
Assistant United States Attorney,  
*Attorney for Appellee.*

(Appendix Follows)



## **Appendix.**



## Appendix

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*United States v. Allied Stevedoring Corp.*, 241 F.2d 925, at 932, 933 states:

“... The error in all these instances is, stated generally, that the prosecution, having called the witnesses, was allowed to impeach them by showing that they had made contradictory statements, and that this was in effect to substitute the early statements in the jurors’ minds for their testimony at the trial. Historically, the doctrine that one may not ‘impeach’ a witness whom one has called rests upon the notion that the party who calls him vouches for his credibility—a notion apparently going back to the time when all trials were deemed in some degree to demand a divine sanction. A party depended upon the oaths of his witnesses, not because of rational inferences from what they said, but because ‘they were “oath-helpers” by whose mere oath, taken by the prescribed number of persons in the proper form, the issue of the cause was determined.’ As Judge Sanborn said in *London Guarantee & Accident Co. v. Woelfle*, 8 Cir., 83 F.2d 325, 332, the rule has ‘come to be more honored in its breach than in its observance,’ for we deem it now settled that the practice is permissible in the discretion of the judge. Contradictory statements may have a legitimate purpose even though in the words of Dean Wigmore, Sec. 1018(b), they ‘are not to be treated as having any substantial and independent testimonial value’; and taken by themselves they no doubt are not to be so recognized. They may, however, in fact revive the witness’s memory and satisfy him that he was right the first time, or, they may show him

the danger of persisting in testimony whose falsity is now detected, and in making him recant. In either event they have a proper function, now generally recognized, even though by itself they have no 'testimonial value.'

"But even when they produce neither result, logically at any rate there is at times no reason to deny their competency. It is one thing to put in a statement of a person not before the jury: that is indeed hearsay bare and unredeemed. But it is quite a different matter to use them when the witness is before the jury, as part of the evidence derived from him of what is the truth, for it may be highly probative to observe and mark the manner of his denial, which is as much a part of his conduct on the stand as the words he utters. Again and again in all sorts of situations we become satisfied, even without earlier contradiction, not only that a denial is false, but that the truth is the opposite: 'The landy doth protest too much, methinks.' This is not to rely upon the statement as a ground of inference, taken apart from the sum of all that appears in court; it is to allow the jury to use the whole congeries of all that they see and hear to tell where the truth lies. We and other courts have a number of times allowed this course to be taken. Indeed to deny this is to hold that nothing that comes from a witness on the stand can be used in support of the issue except his words under oath: the rest of his conduct may be used to refute what he asserts, but for nothing else. In short, out of the whole nexus of his conduct before the jury, they may treat those words alone as affirmatively relevant." (Footnotes omitted.)